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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JIMMY WAYNE SEATON

Plaintiff,

v.

DEPUTY SHERIFF DANNY OWENS,
DAVIDSON COUNTY SHERIFF GERALD
HEGE, DAVIDSON COUNTY SHERIFF'S
DEPARTMENT, and COUNTY OF
DAVIDSON,

Defendants.

Case No. 1:02CV00734



MEMORANDUM OPINION

TILLEY, District Judge

This case is before the Court on the Defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state claims against Defendants Sheriff Hege, Davidson County Sheriff's Department, Davidson County, and Deputy Sheriff Danny Owens in his official capacity. [Doc # 7]. For the reasons set forth below, Defendant's Motion to Dismiss is GRANTED. The Defendants have not moved to dismiss any claims brought against Detective Owens in his individual capacity.

I.

The facts alleged in the complaint, in the light most favorable to the plaintiff, are as follows. Plaintiff Jimmy Seaton owned and operated the Kozy Korner Bargain Market, a salvage operation. Mr. Seaton acquired the inventory for his business from flea markets or processing center warehouses. On February 2, 2002, Mr. Seaton was returning from a trip to purchase inventory from "Dale's Place" when his car was pulled over by Deputy Sheriff Rabon of the Davidson County Sheriff's Office.

Deputy Rabon informed Mr. Seaton that he had been stopped for failing to use his turn signal, and asked Mr. Seaton to get out of his vehicle. Deputy Rabon, part of a special drug task force investigating drug traffic on Interstate 85, asked Mr. Seaton's permission to search the vehicle for drugs and, after receiving it, performed a search. Mr. Seaton showed Deputy Rabon the inventory purchases in his van and the officer prepared to let him go. Deputy Rabon issued a warning ticket for the traffic violation¹ and remained a short while, discussing other matters with Mr. Seaton.

As Deputy Rabon and Mr. Seaton were talking, Detective Owens arrived and asked for an explanation of the situation. Detective Owens then instructed Deputy Rabon to issue Mr. Seaton a formal citation, saying that they "need more of a reason for stopping him." (Compl. at 4.) Detective Owens requested permission

¹Mr. Seaton was also cited for failing to wear a seatbelt.

to search the van but Mr. Seaton refused, saying that Deputy Rabon had already searched the vehicle. Detective Owens responded that "he wasn't Deputy Rabon, he hadn't searched the van, and that he intended to do so, whether Plaintiff liked it or not." (Compl. at 4.) He then instructed Mr. Seaton to open his van doors.

The second search produced an unloaded gun in a clear plastic bag beside the rear door of the van. The cylinder of the gun was open and no ammunition was found near the gun. The two officers debated the legality of Plaintiff's possession of the gun, and then Detective Owens proceeded to search Mr. Seaton's person. Detective Owens confiscated the items in the van, as well as the money, checkbook, and business papers found on Mr. Seaton's person. The entire detention lasted approximately three hours, and was done in view of several flea market patrons.

On February 12, 2002, Mr. Seaton was again returning from Dale's Place with some recently purchased salvage items when he was stopped by Detective Owens, this time with officers from the State Bureau of Investigation ("SBI"). Detective Owens demanded that Mr. Seaton surrender all items purchased from Dale's Place, seemingly using the papers obtained from Mr. Seaton during the first traffic stop as a reference. The officers then confiscated Mr. Seaton's cell phone so that he could not call to warn Dale, the proprietor of Dale's Place. When Mr. Seaton requested to call his attorney, Detective Owens informed him that there was not enough time to do so.

Although the officers did not charge Mr. Seaton, he was required to follow them “downtown” to the SBI office. At the SBI office, Mr. Seaton spoke by phone with his attorney. His attorney then advised the officers either to charge Mr. Seaton or release him. The officers released Mr. Seaton, but did not return his property. After repeated requests for the return of his property failed, Mr. Seaton’s attorney obtained a state court order requiring the Davidson County Sheriff’s Office to return the items. Although Mr. Seaton’s attorney had been told that Mr. Seaton would be charged with various crimes, no charges were ever brought.

Mr. Seaton brought suit against Detective Owens, Sheriff Hege, the Davidson County Sheriff’s Department, and Davidson County on September 5, 2002, alleging that their conduct deprived him of the following rights:

- (1) The right of the Plaintiff, as an American citizen, to travel on the highways of the United States.
- (2) The right of the Plaintiff to be secure in his person and property against unreasonable searches and seizures.
- (3) The right of the Plaintiff to engage in his lawful occupation without unlawful and unreasonable interference by state authorities.
- (4) The right of the plaintiff to equal protection of the law.
- (5) The right of the Plaintiff to due process of law.

Mr. Seaton cites the deprivation of these rights as a violation of the Fourth and Fourteenth Amendments to the United States Constitution and of 42 U.S.C. §§ 1983, 1985(3) and Article I, Sections 1, 7, 19, and 35 of the North Carolina State Constitution. Further, he alleges that Detective Owens’ conduct constituted

negligence under state law, and that Sheriff Hege was negligent in hiring and supervising Detective Owens.²

The Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6)³ of the Federal Rules of Civil Procedure. For the reasons stated below, the Motion to Dismiss will be GRANTED.

II.

The Fourth Circuit has stated that "[u]nder the liberal rules of federal pleading, a complaint should survive a motion to dismiss if it sets out facts sufficient for the court to infer that all the required elements of the cause of action are present." Wolman v. Tose, 467 F.2d 29, 33 n.5 (4th Cir. 1972). Mr. Seaton argues⁴ that in Swierkiewicz v. Sorema, 534 U.S. 506, 515 (2002), the Supreme Court recently held that Rule 8(a) of the Federal Rules of Civil Procedure did not require pleading with the specificity necessary to allege each element of a claim. The Fourth Circuit reads Swierkiewicz differently:

Our circuit has not, however, interpreted Swierkiewicz as removing

²Mr. Seaton cites the North Carolina State Tort Claims Act as a waiver of governmental immunity for these negligence claims, however the Tort Claims Act only applies to state actors, not municipal employees. N.C. Gen. Stat. 143-291(a).

³Defendant Davidson County Sheriff's Department also argued dismissal for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) in Defendants' Brief in Support of Motions to Dismiss, but the issue was not raised in the Defendants' Motion to Dismiss and is therefore waived under Fed. R. Civ. P. 12(h)(1).

⁴All future submissions by Mr. Seaton should comply with the font and page-numbering requirements set out in Local Rule 7.1.

the burden of a plaintiff to allege facts sufficient to state all the elements of her claim. See Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir.2002) ("[T]he Supreme Court's holding in Swierkiewicz v. Sorema did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim." (internal citation omitted)); Iodice, 289 F.3d at 281. These cases reject Bass' contention. While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff is required to allege facts that support a claim for relief.

Bass v. Dupont, 324 F.3d 761, 765 (4th Cir. 2003).

III.

There are essentially two elements to a claim brought under 42 U.S.C. § 1983: (1) The defendant deprived the plaintiff of a right or privilege secured by the Constitution and federal laws, and (2) the deprivation was done under color of state law. Monroe v. Pape, 365 U.S. 167 (1961). Claims pursuant to § 1983 may be brought against governmental entities, and against individual government actors in either their official or individual capacities.

Mr. Seaton alleges that the deprivations he suffered under color of law include: (1) his right to travel on the highways of the United States; (2) his right to be secure in his person and property against unreasonable searches and seizures; (3) his right to pursue a lawful occupation without unreasonable interference; (4) equal protection; and (5) due process.

There is no issue as to whether the actions described in the complaint were taken under color of state law.⁵ The issue is whether the complaint sets out facts from which it may be inferred that the "Supervisory Defendants" (Defendants Sheriff Hege, Davidson County Sheriff's Department and Davidson County) and/or Detective Owens deprived Mr. Seaton of any federal constitutional rights. Because it is unclear from the Complaint whether Mr. Seaton is bringing the § 1983 claims against Sheriff Hege and Detective Owens in their official or individual capacities, both possibilities will be discussed below. The Defendants have not moved to dismiss any claims brought against Detective Owens in his individual capacity, therefore those claims will not be discussed here.

A.

Section 1983 claims brought against defendants in their official capacities constitute claims against the entity of which those officials are agents. See Ky. v. Graham, 473 U.S. 159, 165-66 (1985). Because Detective Owens and Sheriff Hege work for the same municipal entity, a suit against either in his official capacity is effectively a suit against that entity. Therefore, the § 1983 claims against both officers in their official capacities will be analyzed together.

To state a claim against a municipal entity, a plaintiff must allege facts to support a finding that: (1) officials who, under state law, have final policymaking

⁵The police function is "one of the basic functions of government," a "most fundamental obligation of government to its constituency." Foley v. Connelie, 435 U.S. 291, 297 (1978).

authority for that entity (2) officially sanctioned or ordered the acts. Dotson v. Chester, 937 F.2d 920, 924 (4th Cir. 1991). In other words, the plaintiff must allege that an official policy⁶ of that entity, as ordered by someone with the authority to speak for that entity, led to the violation of his rights. Carter v. Morris, 164 F.3d 215, 218 (4th Cir.1999).

The complaint in this case contains the following allegations regarding Sheriff Hege, the Davidson County Sheriff's Office, and Davidson County:

46. Defendant Gerald Hege, as Sheriff of Davidson County, is responsible for the hiring, supervision, and retention of his subordinates, and the acts of Defendant Owens demonstrate that Defendant Hege was negligent in said hiring, supervision, and retention of Defendant Owens. Further, Defendant Hege is ultimately responsible for the supervision of activities of the Davidson County Sheriff's Department, and all investigations conducted by that agency. Defendant Hege was negligent in his supervision of the investigation that resulted in the acts complained of, and injury proximately resulted to the Plaintiff.

48. Defendant Davidson County Sheriff's Department is an agency of the County of Davidson, State of North Carolina, and is the agency by which Defendants Hege and Owens are employed, and so is responsible for the acts complained of.

49. Defendant County of Davidson is the county whose agency, the Davidson County Sheriff's Department, was responsible for the acts complained of.

⁶An official policy may include: an express oral or written policy; decisions of a person with final policymaking authority; an omission, such as a failure to properly train officers, that "manifest[s] deliberate indifference to the rights of citizens;" or a practice that is so "persistent and widespread" as to constitute a "custom or usage with the force of law." Carter v. Morris, 164 F.3d 215, 217 (4th Cir. 1999).

There is no allegation that Sheriff Hege was in any way personally involved in either the February 2nd or 12th incidents. There is no allegation that Sheriff Hege had knowledge of either incident involving Detective Owens, or of events which should have alerted him to those incidents. There is no allegation that any other supervisory official in the Sheriff's Office had knowledge or information about, or participated in either incident. There is no allegation that Detective Owens had engaged in similar practices over a period of time, other than the two incidents in question. There is also no allegation that others within the Sheriff's Office had engaged in similar conduct over a period of time, such that it might be inferred that similar conduct had become a custom or policy of the Office.

In short, there is no allegation from which it might be inferred that Sheriff Hege, the Davidson County Sheriff's Department, or Davidson County has any liability for the deprivation of any of Mr. Seaton's constitutional rights. Therefore, the Motion to Dismiss is GRANTED as to all claims against Sheriff Hege in his official capacity, the Davidson County Sheriff's Department and Davidson County.⁷

⁷The Defendants maintain that a county cannot be held liable for the acts of a sheriff. Court have disagreed on this issue. See e.g., Flood v. Hardy, 868 F. Supp. 809 (E.D.N.C. 1994) (finding that a sheriff can bind the county; North Carolina ex. rel. Wellington v. Antonelli, 2002 WL 31875504 (M.D.N.C. 2002) (unpublished) (finding that a county is not liable for the acts of a sheriff). However, because Mr. Seaton's Complaint fails to state a claim against Sheriff Hege, this Court need not address whether the county might have been liable for his acts.

Because the municipality has no liability under the facts alleged in this case, the official capacity claim against Detective Owens shall also be DISMISSED.

B.

To the extent Mr. Seaton is seeking relief from Sheriff Hege in his individual capacity, Mr. Seaton's Complaint also fails to state a claim. To establish individual liability under § 1983, a plaintiff must affirmatively show that the "official charged acted personally in the deprivation of the plaintiff's rights." Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985). Thus, each defendant must have had personal knowledge of and involvement in the alleged violations of constitutional rights or, in the case of a supervisor, tacitly approve the anticipated conduct of a subordinate. Slaken v. Porter, 737 F.2d 368, 372 (4th Cir. 1984).

The only direct responsibility Mr. Seaton specifically attributes to Sheriff Hege is a general assertion, unsupported by facts, that Sheriff Hege was negligent under state law in the hiring and supervision of Detective Owens. The Complaint also includes a general statement that all of the Defendants deprived Mr. Seaton of his rights under color of law, but does not allege any facts to suggest that any Defendant except Detective Owens acted personally in the deprivation of Mr. Seaton's rights.

Sheriff Hege is also not liable in his supervisory capacity for the acts of Detective Owens. There are three elements for establishing supervisory liability under § 1983: "(1) that the supervisor had actual or constructive knowledge that

his subordinate was engaged in conduct that posed ‘a pervasive and unreasonable risk’ of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show ‘deliberate indifference to or tacit authorization of the alleged offensive practices;’ and (3) that there was an ‘affirmative causal link’⁸ between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.” Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (internal quotations omitted).⁹

The first element of supervisory liability requires the officer to have knowledge of both an unreasonable risk of constitutional injury, and of repeated conduct of this type by his employees. Id. The second element, deliberate indifference or tacit authorization, also generally requires knowledge of an ongoing series of abuses. A plaintiff must provide evidence of more than a few isolated incidents in order to establish that the supervisor could be expected to guard against those abuses. Id.

Mr. Seaton’s Complaint fails to allege facts from which any of the elements of supervisory liability could be inferred. Therefore, to the extent Mr. Seaton claims

⁸An affirmative causal link may be supplied by ordinary tort principles that hold defendants liable for the natural consequences of their actions. Shaw, 13 F.3d at 799.

⁹Mr. Seaton denies the applicability of this test because it is an “evidentiary standard” and need not be met to withstand a 12(b)(6) motion, citing Swierkiewics v. Sorema, N.A., 534 U.S. at 515 (2002). However, as previously noted, the Fourth Circuit still requires plaintiffs to set forth facts in the complaint sufficient to allege each element of a claim.

a § 1983 violation by Sheriff Hege in his individual capacity, the Defendants' Motion to Dismiss those claims shall be GRANTED.

Similarly, there are no facts alleged from which an inference may be drawn that Sheriff Hege either participated in a §1985(3) conspiracy or agreed to participate in or was aware of any such conspiracy to deprive Mr. Seaton of the equal protection of the law. That claim shall also be DISMISSED as to Sheriff Hege in both his individual and official capacities.

IV.

In addition to the federal claims discussed above, Mr. Seaton brings claims under North Carolina's common law and under the North Carolina Constitution. For the reasons stated below, the Defendants' Motion to Dismiss will be GRANTED. As stated earlier, this means all state claims shall be DISMISSED against Davidson County, the Davidson County Sheriff's Department, and Sheriff Gerald Hege. All state claims against Detective Owens in his official capacity shall also be DISMISSED. The Defendants have not moved to dismiss state claims against Detective Owens in his individual capacity and those claims remain.

A.

Mr. Seaton alleges that the rights denied to him by the Defendants were protected under Article 1, Sections 1, 7, 19, & 35 of the North Carolina Constitution. The Defendants argue that state common law provides adequate

remedies for the wrongs Mr. Seaton allegedly suffered, and for the rights of which the Defendants allegedly deprived him. Because, under well-established North Carolina law, adequate common-law remedies preclude direct claims under the North Carolina constitution, the Defendants contend that Mr. Seaton cannot pursue his state constitutional claims.

Mr. Seaton bases his state constitutional claims on the events surrounding two traffic stops. Specifically, he alleges that during the first detention, Detective Owens arrived after a search of the van had been completed, at a time when Seaton was about to be released. Owens asked for, but was refused, permission to conduct another search, proceeded to search the van anyway (according to the facts alleged, it would have been without probable cause) and, thereby, prolonged the detention. Owens seized the contents of the van and the papers and currency on Mr. Seaton's person. Several days later, during the second occurrence, the facts were similar: Mr. Seaton's van was stopped without cause and he was detained while another search was conducted. Again, items were seized. After the search Mr. Seaton was required to accompany the officers to the SBI office before being released. His personal and business reputation was adversely affected because persons with whom he came into regular contact at the flea market observed him being detained and searched. He also lost the personal and business use of the items which had been seized during the two searches and did

not regain use until obtaining a state court order forcing the officers to return the items.

This conduct, Seaton claims, amounted to several violations of the North Carolina Constitution: (1) deprivation of his right to be secure in his person and property from unreasonable searches and seizures, (2) deprivation of his right to due process of law, (3) deprivation of his right to engage in his lawful occupation without unlawful and unreasonable interference by state officials, (4) deprivation of his right as a United States citizen to travel on the highways of the United States, and (5) deprivation of his right to equal protection of the law.

Initially, it should be observed that the fifth state constitutional claim, violation of the right to equal protection, is not supported by facts alleged in the complaint. Those facts do not support an inference that Mr. Seaton was selected for detention or search because he was a member of a particular class or that the law under which he was detained or searched affected him differently than others because he was a member of a particular class.

In Corum v. University of North Carolina, 330 N.C. 761, 788, 413 S.E.2d 276, 293 (1992), the North Carolina Supreme Court held that direct claims under the North Carolina Constitution were maintainable only against the state, not against individuals. The court also held that the state enjoyed no immunity from direct constitutional claims. Id. at 786, 413 S.E.2d at 292. However, a direct

action under the North Carolina Constitution may be brought only when there is not another adequate state remedy available. Id. at 784-5, 413 S.E.2d at 291.

The focus of the appropriate inquiry here is examining the availability of other state claims which the courts of North Carolina would hold “adequate” to supplant Mr. Seaton’s direct constitutional claims. An adequate, alternative remedy may be one existing at common law or it may be one created by statute. See Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995) (citing Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993)).

In similar factual situations, North Carolina courts have identified other state remedies adequate to replace claims of unreasonable search and seizure and of deprivation of liberty without due process under the North Carolina Constitution. Because a deprivation of the property seized is the gist of an unreasonable search and seizure claim, North Carolina’s common law tort claim of trespass to chattels has been held adequate to supplant the direct constitutional claim of unreasonable search and seizure. See Rousselo v. Starling, 128 N.C. App. 439, 448, 495 S.E.2d 725, 731 (1998), cert. denied, 348 N.C. 74, 505 S.E.2d 876 (1998). Because freedom from an unjustifiable detention is the right protected both by the common law action for false imprisonment and the North Carolina constitutional provision prohibiting deprivation of liberty without due process of law, a claim for false imprisonment has been held adequate to protect that right. Id. at 730-1.

The elements of false imprisonment and trespass to chattels (also referred to as trespass to personal property) are inferred by the facts set out in the complaint. False imprisonment is the deliberate restraint of a person without lawful authority and without consent. See Emory v. Pendergraph, 154 N.C. App. 181, 185, 571 S.E.2d 845, 848 (2002). Trespass to chattels is the unauthorized interference with a person's possession¹⁰ of personal property. North Carolina Pattern Instructions (Civil) §805.10 (5/2001).

In addition, Mr. Seaton has filed a claim for negligence against each of the parties and that claim may, arguably, subsume both the claims for false imprisonment and trespass to chattels. The overriding issue for each is whether Detective Owens had a lawful reason to detain Mr. Seaton and, then, to perform the searches and seize his property. The answer is dependant upon a finding of probable cause for each. The finding of probable cause depends upon a determination of what a reasonable officer would have understood and done in a similar factual situation. See Campbell v. Anderson, 156 N.C. App. 371, 377, 576 S.E.2d 726, 730 (2003) (finding that "questions of reasonableness concerning [a] search, seizure, and arrest address issues of whether defendant was negligent in performing his official duties.").

The same common law remedies are also adequate to protect the interests addressed in Mr. Seaton's third and fourth state constitutional claims. Assuming

¹⁰ Possession may be actual or constructive.

for present purposes that the North Carolina Constitution protects Mr. Seaton's right to use the highways of the United States, that claim -- as well as his claim that Detective Owens' conduct violated his right to engage in his chosen employment -- could be fully remedied in an action for false imprisonment. Both claims relate directly to the same issue: whether either or both of the detentions was justifiable. If so, Mr. Seaton was appropriately detained and neither his right to engage in his occupation or to travel could have been impermissibly burdened. If, on the other hand, he was improperly detained, a recovery under the tort of false imprisonment would allow recovery for damages relating to the detention, including any harm to his reputation and economic loss to his business.¹¹ If loss of use of the items seized adversely affected his business, he could recover under a claim for trespass to chattels.¹²

Having found that the state courts would recognize the existing common law remedies of false imprisonment and trespass to chattels to be appropriate alternatives under the facts alleged in Mr. Seaton's complaint, the next step is to determine whether the courts of North Carolina would find those remedies still "adequate" to replace the constitutional claims even though each of the defendants might enjoy immunity from those claims.

¹¹See Compensatory Damages for False Imprisonment, 13 Am. Jur. POF 3d 111, §15 (2003).

¹²See North Carolina Pattern Instructions (Civil) §805.15 (5/2001).

Although the state is not immune from a direct constitutional claim, the governmental entity -- the true defendant when a governmental actor is sued in his official capacity -- does enjoy absolute immunity from common law tort actions unless it has chosen to waive that immunity. Immunity is waived by the purchase of insurance but only to the extent of the monetary coverage in effect. See e.g., Mullins v. Friend, 116 N.C. App. 676, 680-81, 449 S.E.2d 227, 230 (1994).

Waiver of governmental immunity by the procurement of insurance is an element of a tort claim against a municipality and, as such, must be pled in order to state a claim. See Clancy v. Onslow County, 151 N.C. App. 269, 275, 564 S.E.2d 920, 924 (2002) ("[I]n the absence of an allegation in the complaint in a tort action against [a governmental unit], to the effect that such [unit] had waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such [unit] has waived its immunity ..., such complaint does not state a cause of action"). See also Myers v. Town of Landis, 957 F. Supp. 762, 771 (M.D.N.C. 1996).

Because waiver of immunity has not been pled, there are no facts alleged which support an inference that either Davidson County or the Davidson County Sheriff's Department has waived its governmental immunity. Accordingly, the Defendants' Motion to Dismiss the state claims against them and the state tort

claims against Sheriff Hege and Detective Owens in their official capacities will be GRANTED and those claims DISMISSED.¹³

Not only do governmental entities enjoy immunity from tort claims in North Carolina, but individual law enforcement officers are also immune from many tort claims. A police officer performing his official duties is engaged in a governmental function. Mullins, 116 N.C. App. at 731, 449 S.E.2d at 230. A public employee acting within the scope of his official duties, and engaged in a discretionary function, may not be held liable for negligence in his individual capacity. See Campbell, 156 N.C. App. at 377, 576 S.E.2d at 730. Essentially, a police officer in North Carolina “enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice.” Id.

There is no need to consider the effect of public officer immunity regarding the claims against Sheriff Hege in his individual capacity. No allegations of fact in the complaint support an inference that he participated in the detention or search of Mr. Seaton in any way, or that he would have derivative liability for those acts, even if he were not immune. The tort claims for negligence, false imprisonment, and trespass to chattels will be DISMISSED as to Sheriff Hege in his individual capacity.

¹³N.C. Gen. Stat. 58-76-5 provides another exception to immunity where a plaintiff also sues the surety of a sheriff’s bond. As the surety of Sheriff Hege’s bond is not a party to this suit, this exception does not apply. Messick v. Catawba County, 110 N.C. App. 707, 715, 431 S.E.2d 489, 494, cert. denied, 334 N.C. 621, 435 S.E.2d 336 (1993).

It is necessary to consider whether Detective Owens might be entitled to public officer immunity (also referred to as public official immunity) to the claims for negligence, false imprisonment and trespass to chattels and, if so, whether that would affect their “adequacy” in supplanting the direct constitutional claims. Unlike the waiver of governmental immunity which, as a substantive part of a claim, must be pled in the complaint to state a cause of action, an individual officer’s public officer immunity is regarded as an affirmative defense and must be appropriately raised by that officer. Epps v. Duke University, Inc., 122 N.C. App. 198, 205, 468 S.E.2d 846, 852 (1996).

While Detective Owens has raised public officer immunity as a defense in his answer, his entitlement is not before the Court on this 12(b)(6) motion, which examines the sufficiency of a well pleaded complaint. Since the complaint does not allege facts which would support an inference that Detective Owens acted corruptly, maliciously, or outside his official duties when he detained and searched Mr. Seaton, it is possible that at a later stage Detective Owens might be found to enjoy immunity from each of the tort claims.

Despite the fact that the Detective Owens might be found to enjoy public officer immunity from the state law tort claims, leaving no named Defendant subject to a finding of liability, Mr. Seaton is still considered under current North Carolina law to have had adequate state remedies. In substantially identical circumstances -- where the governmental entity had not waived immunity and the

plaintiff could not show an additional element of malice or corruption to overcome public officer's immunity, the North Carolina Court of Appeals held the common law remedies of false imprisonment and trespass to chattels adequate to supplant the direct constitutional claims of unlawful search and seizure and deprivation of liberty without due process. Rousselo v. Starling, 128 N.C. App. 439, 448-9, 495 S.E.2d 725, 731-2 (1998), cert. denied, 348 N.C. 74, 505 S.E.2d 876 (1998). As a result, the Court held that the state constitutional claims should be dismissed.

In the present case, however, there is not an absence of a remedy -- the common law action of trespass to chattel provides a remedy to the wrong of an unlawful search. (Internal cites omitted). We decline to hold that Rousselo has no adequate remedy merely because the existing common law claim might require more of him. (Showing that the officer acted maliciously, corruptly or outside the scope of his official duties). As the common law remedy of trespass to chattel provides an adequate vindication of the right to freedom from unreasonable searches, we hold that the trial court did not err in granting summary judgment to Trooper Starling on this claim. (Parenthetical added).

Id. at 449, 495 S.E.2d at 732.

In a diversity action, a holding of the North Carolina Court of Appeals is persuasive on a point of North Carolina law unless the federal court considering the issue is convinced that the North Carolina Supreme Court would decide the issue differently. See Parlato v. Abbott Labs., 850 F.2d 203, 206-7 (4th Cir. 1988). By declining a petition for certiorari, the North Carolina Supreme Court has chosen not to disturb the holding in Rousselo. The direct claims under the North Carolina constitution will be DISMISSED as to all parties.

B.

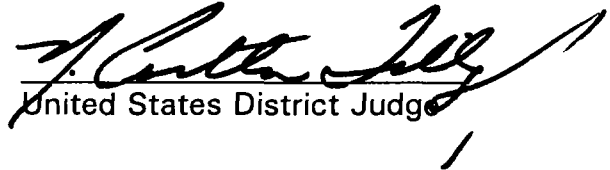
For the reasons discussed in Part IV(A), the tort claims of negligence, false imprisonment and trespass to chattels (the common law claims) against Davidson County, the Davidson County Sheriff's Department, and Sheriff Hege and Detective Owens in their official capacities will be DISMISSED because of governmental immunity. The common law claims against Sheriff Hege in his individual capacity will be DISMISSED because there are no facts alleged in the complaint which support an inference that he had any participation in any of the events complained about or that he has derivative liability for any of those events.

As discussed in Part IV(A), the complaint does state claims for negligence, false imprisonment, and trespass to chattels against Detective Owens in his individual capacity. The Defendants have not moved to dismiss those claims and while, as mentioned earlier, the question of public officer immunity may be addressed at a later time, it is not presented at this stage.

V.

For the reasons stated above, the Defendants' Motion to Dismiss is GRANTED. The Defendants have not moved to dismiss any claims against Detective Owens in his individual capacity and these claims remain.

This the 8th day of December, 2003.


United States District Judge